Supreme Court, U.S.
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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-1875

FRED SMITH, Commissioner,
Alabama Department of Corrections et al.

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The decision of the Court of Appeals for the Eleventh Circuit (Appendix A to the petition) is reported at 726 F.2d 1505 (11th Cir. 1984). The decision of the District Court (Appendix B to the petition) is reported at 568 F.Supp. 1499 (S.D.Ala. 1983).

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does the decision below, which invalidates the 1976 Alabama capital sentencing scheme because of the requirement that the sentencing authority consider a constitutionally impermissible factor, conflict with any decisions of this court?

2. Did the Court below correctly apply the harmless error analysis mandated by this Court's decisions in Zant v. Stephens, ___U.S.___, 77 L.Ed 2d 235 (1983) and Lockett v. Ohio, 438 U.S. 586 (1978)?

3. Did the Court below err in holding that Alabama v. Evans ___U.S.___, 75 L.Ed 806 (1983) did not bar the relief which respondent sought?

STATEMENT OF THE CASE

The respondent Wayne Eugene Ritter was tried, convicted and sentenced to death under the 1975 Alabama capital sentencing scheme which was the subject of this Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980). Under that statutory scheme, if a jury found a defendant guilty of a capital offense, it was required to mandatorily fix the punishment at death. The trial judge was then required to hold a sentencing hearing wherein he was required to weigh the aggravating and mitigating circumstances and the mandatory jury sentence of death. Ala. Code § 13-11-4 (1975) (Repealed 1981). The statute then required him, after he completed his weighing process, to decide whether he "will refuse to accept the death penalty as fixed by the jury."

The constitutional flaws obvious in this scheme were highlighted by this Court in its Beck opinion. As this Court noted:

> [I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to the statistics submitted by the state attorney general, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate sentencing hearing in aggravation and mitigation before he imposes sentence.
>
> Beck v. Alabama, 447 U.S. at 645 (footnote omitted)

Following the remand of the Beck case from this Court, the Alabama Supreme Court, recognizing the obvious deficiencies of the 1975 statute, rewrote the statute. Beck v. State, 396 So.2d 645 (1980). In so doing, they eliminated the mandatory jury verdict provision and ordered new trials for the vast majority of inmates on Alabama's death row. In 1981, the Alabama legislature enacted an entirely new death penalty law, codified at Ala. Code § 13A-5-39 et seq. (1975). Capital trials of offenses occurring after July 1, 1981 have been tried according to that statute. Retrials and resentencing hearings for persons accused of capital crimes prior to the effective date of the 1981 Act have taken place under the procedure mandated in Beck v. State.

Respondent initiated his federal challenge to the constitutionality of the 1975 Alabama capital sentencing scheme

by filing a writ of habeas corpus on May 5, 1984. After being denied relief by the district court, he appealed to the United States Court of Appeals for the Eleventh Circuit which found that the mandatory death sentence provision of the Alabama law under which respondent Ritter was sentenced to death was constitutionally infirm. As the Court remarked:

> [T]he inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional. (App.39a)

The Court then ordered that respondent be given a new sentencing hearing.

ARGUMENT

The decision of the Eleventh Circuit in this case carries none of the majesty or malevolence that the petitioner seeks to bestow on it. It is simply a decision which appropriately administers the coup-de-grace to a capital sentencing scheme that this Court had already mortally wounded in Beck v. Alabama. It concerns a statute which the state itself has buried and no longer uses. The opinion of the Court of Appeals does not order that respondent be set free or even re-tried. It simply requires that he be given a capital sentencing hearing which comports with the Constitution. After such a hearing, he would either be resentenced to death or given a sentence of life imprisonment without the possibility of parole.

Moreover, the decision below articulates no new law, but simply follows settled Supreme Court precedent in determining that respondent is entitled to have a new sentencing hearing. It is a manifestly correct decision which should not be reviewed further by this Court.

I.

THE DECISION BELOW DETERMINING THAT THE ALABAMA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL DOES NOT EXPAND HABEAS CORPUS LAW AND DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE.

The state attempts to portray the decision below as a Frankenstein monster which would radically expand the "Great Writ" by allowing facial constitutional attacks to be brought in habeas cases. In so doing, the state makes an inventive yet disingenuous argument which mixes, without distinction, this Court's jurisprudence on habeas corpus, standing and waiver. The state's argument that facial constitutional attacks cannot be brought in habeas proceedings intentionally blurs the concepts of constitutional error and harm in an attempt to minimize the blatant unconstitutionality of the Alabama death penalty statute here at issue and to undermine the correctness of the decision below.

A. FACIAL CONSTITUTIONAL ATTACKS ARE COGNIZABLE IN A HABEAS CORPUS PROCEEDING

There is simply no support for the contention of the state that facial constitutional attacks cannot be brought in a federal habeas proceeding under 28 U.S.C. 2254. The statute itself contains no such prohibition. Indeed, § 2254 simply speaks of "constitutional violations." There is nothing in the language of the statute to even remotely suggest that a constitutional violation caused by a facially defective statute is to be treated differently than one caused by a trial judge or a prosecutor. Indeed such a construction of the habeas statute would do violence to the statute's plain meaning.

Following the statute's mandate, lower federal courts have consistently entertained facial challenges to death penalty statutes in habeas corpus proceedings. In the wake of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), lower federal courts consistently vacated death sentences based on the facial invalidity of state statutes. See e.g. Eaton v. Capps, 480 F.2d 1021 (5th Cir. 1973); Newman v. Wainwright, 464 F.2d 614 (5th Cir. 1972). That practice correctly continues today. See Richmond v. Cardwell, 450 F.Supp. 519 (D.Arizona 1978)(Arizona death penalty statute declared facially invalid in a habeas corpus proceeding.) The exercise of habeas corpus jurisdiction over facial challenges has not been limited to capital statutes. See, e.g. U.S. ex rel Newsome v. Malcolm, 492 F.2d 1166 (2nd Cir.

1974); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974) rev'd on other grounds; Stone v. Powell, 428 U.S. 465 (1976). (Facial challenges to state vagrancy laws).

The position of the state, taken to its logical conclusion would deny state criminal litigants the right to challenge the constitutionality of the state statutes under which they had been sentenced. According to the argument of the state, if this Court were to decline to review a facial challenge to a state criminal statute on a petition for writ of certiorari after direct appeal in the state court system, that decision would be tantamount to a decision upholding the constitutionality of the statute since the litigant would not be allowed to raise the issue in a federal habeas corpus proceeding. A decision adopting the state's position would destroy the fabric of habeas corpus and improperly deny a federal forum to litigants who merit it.

B. THE 1975 ALABAMA DEATH PENALTY LAW WAS UNCONSTITUTIONALLY APPLIED TO RESPONDENT RITTER

As previously noted, the state's argument that facial constitutional challenges are not cognizable in habeas corpus proceedings mixes together, without distinction, a series of concepts in an attempt to portray the decision below as an expansion of existing law. The most erroneous mixing occurs as the state tries to argue that the Eleventh Circuit erred when it allowed Respondent to attack the constitutionality of the Alabama death penalty law when, according to its argument he was not prejudiced by it. That argument obviously confuses the question of whether or not there was a constitutional violation with the question of harmless error.

The state premises its argument on this point on the fact that the statute was not unconstitutional as applied to Respondent. That argument is patently specious. The record is clear that the judge in Respondent's case followed the unconstitutional Alabama law and utilized the standardless and unguided jury sentence of death as one of the factors he considered in deciding whether or not to sentence the appellant

to death.[1] Respondent's death sentence was thus based in part on "a constitutionally impermissible factor in Alabama's capital sentencing scheme" (Appendix at p. 37a). It was thus plainly unconstitutional as applied to him. The petitioner's reliance on this court's language in Broadrick v. Oklahoma is misplaced. This case is not a case where the statute may be "applied unconstitutionally to others in situations not before the court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). This statute can never be applied constitutionally to anyone so long as the sentencing judge is required to and does take into account the standardless mandatory jury sentence of death in reaching his life or death determination. The question of whether or not there is a constitutional violation is a question separate and apart from a question of harmlessness, see generally, Chapman v. California, 386 U.S. 18 (1967) and the state's confusion of the issue is an obvious attempt to impart an evil hue to the decision of the Court of Appeals. The Court below correctly applied existing law as it regards the issues cognizable in a habeas corpus proceeding and correctly applied the law as it regards standing to raise constitutional challenges. The decision below neither conflicts with this Court's previous decisions nor raises an important question of federal law which this Court should decide.

II.

THE DECISION BELOW CORRECTLY FOLLOWS THE ANALYSIS OF THE HARMLESS ERROR RULE WHICH THIS COURT'S PRIOR DECISIONS HAVE MANDATED BE APPLIED IN CAPITAL CASES

The state seeks to portray the decision below as a "mischaracterization" of this Court's harmless error rules. In reality, the decision below is a narrow, carefully worded opinion which tracks this Court's prior analysis. The Eleventh Circuit did not blaze a path of its own but merely followed the beacon of this Court's opinion in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983). As the Court remarked:

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[1] Transcript of state trial at 246. The trial judge in deciding sentence weighed four aggravating circumstances, two mitigating circumstances and the jury's mandatory sentence of death.

> The import of Stephens is clear: a federal harmless error analysis will be applied to a facial constitutional defect in a capital sentencing scheme if, and only if, two criteria are met. First, independent of the invalid factor, the sentencing scheme must limit and channel the sentencer's discretion. Second, the invalid factor must not interject constitutionally impermissible or totally irrelevant considerations into the sentencer's exercise of that discretion. (App. 45a).

The Court then went on to note that in Stephens, both of these criteria were met and the defendant's death sentence was therefore constitutionally imposed. Conversely, the Court concluded in Lockett v. Ohio, 438 U.S. 586 (1978), the first test of Stephens was met but the Ohio statute failed the second and "...the defendant's death sentence was vacated without further inquiry." (App.p.46). The Court then applied the Stephens criteria to the Alabama capital sentencing scheme.

> In the present case, we assume without deciding that, absent the invalid factor of the jury's mandatory death sentence, the 1975 Alabama death penalty statute's statutory aggravating and mitigating factor's suitably limit the sentencer's discretion. We hold, however that this invalid factor injects a constitutionally irrelevant consideration into the sentencer's exercise of that discretion in determining whether to impose a sentence of death. Therefore, as in Lockett, no further inquiry is required, and petitioner's death sentence is due to be vacated. (App. 47a)

The actions of the Eleventh Circuit are perfectly consistent with this Court's actions in other death penalty cases. In Jordan v. Arizona, 438 U.S. 911 (1978), for example, this Court, in the wake of Lockett, vacated the judgment of the Arizona Supreme Court in that case "insofar as it leaves undisturbed the death penalty imposed." This Court vacated the sentence in spite of the fact that the defendant in Jordan presented no evidence in mitigation at his sentencing hearing and was thus not arguably affected by the constitutional error. See Knapp v. Cardwell, 513 F.Supp. 4, 8 (D.Arizona 1980).

The state admits, as it must, that this Court in Stephens did indicate that a death sentence imposed by a sentencer who was required to rely on a factor which is "constitutionally

impermissible or totally irrelevant to the sentencing process" would have to be set aside. Zant v. Stephens, 77 L.Ed2d at 255. It seeks to distinguish the Alabama scheme by arguing that the Stephens test applies only to "aggravating circumstances." That argument is plainly transparent. Since the statutory scheme here under attack required the trial judge to weigh the constitutionally impermissible factor, it matters not whether the factor was labelled an "aggravating circumstance" or not. The fatal flaw is still present because the sentencing authority in sentencing the respondent to death relied on the jury's mandatory sentence of death which was a factor which was constitutionally impermissible and totally irrelevant. The Stephens test was properly applied to the constitutional violation in this case. The decision below reflects the settled law of this Court and does not present a proper question for this Court's review.

III.

THE DECISION BELOW THAT THIS COURT'S DECISION IN ALABAMA V. EVANS DID NOT BAR THE GRANTING OF RELIEF TO RESPONDENT IS EMINENTLY CORRECT

Faced with the obvious constitutional flaw of the Alabama death penalty statute, the state argues that the decision of this Court vacating a lower court stay in his co-defendant's case, see Alabama v. Evans, ___U.S.___, 75 L.Ed 2d 806 (1983), talismanically bars relief for respondent from the unconstitutionality of his death sentence. As the lower court correctly decided, the Evans stay case has no bearing on the outcome of his appeal.

Though Evans and respondent were co-defendants at trial, their paths diverged on appeal. Respondent continued on an orderly course in his appeal process while his co-defendant Evans embarked on a path which ultimately sealed his fate. Following the decision of this Court in Hopper v. Evans, 456 U.S. 405 (1982), the Evans case was sent back to the Eleventh Circuit for that court to decide the constitutionality of Alabama's capital sentencing scheme. In July of 1982, after briefing and before a decision, Evans dismissed his attorneys and filed a motion with the Court of Appeals seeking leave to dismiss his appeals. An

exchange of letters between the Clerk's Office and Evans left no doubt that Evans was fully aware of the legal consequences attendant to dismissal of his appeal. He nonetheless persisted in that course of action and on October 19, 1982 the Eleventh Circuit dismissed his appeal. As he was facing imminent execution, Evans attempted again to utilize the federal habeas corpus system to save his life and failed because he had previously voluntarily dismissed his first set of federal appeals. The Court of Appeals found that Alabama v. Evans, did not bar relief for respondent on at least four grounds. First, Alabama v. Evans, was not a decision on the merits of a constitutional challenge to Alabama's 1975 death penalty law but was a decision on an application to vacate a stay; Second, the merits of the sentencing claim were not discussed; Third, the Court's analysis of Evans' claims was consistent with its analysis of successor habeas petitions and lastly, the dissent of Justice Marshall clearly shows that the decision was not intended as one on the merits of Evans' sentencing claims. (App.25a-27a). The Court's opinion is totally supported by the text of the Alabama v. Evans opinion and this Court's jurisprudence. There are no grounds upon which the decision should be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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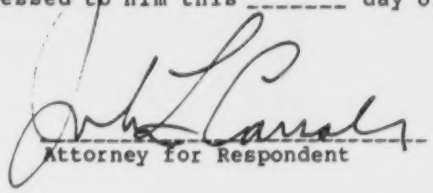
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served upon Ed Carnes, Assistant Attorney General, by U. S. Mail, postage prepaid, properly addressed to him this _____ day of July, 1984.



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